In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

Supreme Court, U. S.
FILED
NOV 16 1977
MICHAEL RODAK, JR., CLERK

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitoners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM AS AMICUS CURIAE

HARRY L. DU BRIN, JR.
New York State Teachers' Retirement System
143 Washington Avenue
Albany, New York 12210
Assistant Executive Director and Legal Advisor

KARL E. NISOFF, Counsel
WILLIAM B. JENSEN, Assistant Counsel
DAVID A. WEISS, Assistant Counsel

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 2

SUMMARY OF ARGUMENT 3

ARGUMENT

POINT I — WHEN VIEWED IN THE CONTEXT OF *GENERAL ELECTRIC V. GILBERT*, IT IS APPARENT THAT THE RESPONDENTS HAVE NOT SHOWN A GENDER-BASED DISCRIMINATORY EFFECT AT ALL 5

A. The Petitioners' plan provides as great an aggregate benefit to female employees as it does to male employees, therefore there is no gender-based discrimination at all in the present case 5

B. In the case before the Court, discriminatory effect is most relevantly measured by comparing risk classes, the individual members of which are grouped according to the quantum of risk which they introduce to the plan; viewed in this manner, it is apparent that there is no discriminatory effect against the employer's female employees..... 7

POINT II – THE LEGAL STANDARDS APPLIED BY THE COURTS BELOW VIOLATED THE PROVISIONS OF TITLE VII, AS REFLECTED IN THE LEGISLATIVE INTENT AND DECISIONS OF THIS COURT 11

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

PAGES

Albermarle Paper Co. v. Moody, 422 U.S. 405, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975) 15

Dothard v. Rawlinson, 45 United States Law Week 4888 (decided June 27, 1977) 15

Geduldig v. Aiello, 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974) ..... 3, 5, 6, 10, 13, 16.

General Electric v. Gilbert, 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976) 3-7, 10, 11, 13, 15

Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971) 15

Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976) 16

Other Authorities

29 C.F.R. §800.116 (d) (1975) 12

110 C.R. 7217 16

Employee Benefits Journal, "Sex and the Single Table: Equal Monthly Retirement Income For The Sexes", B.J.Lautzenheiser, Fall 1976 ..... 8, 13

Life Insurance, 6th Edition, S.S. Heubner and Kenneth Black, Jr., page 441 8

Mortality Under Standard Ordinary Insurance Issues between 1972 and 1973 Anniversaries, Transactions, Societies of Actuaries, 1974 Reports Number, pp. 18-22 14

Statement of American Life Insurance Association and the Health Insurance Association of America in connection with HEW rules at p. 22 8-9

TIAA Participant, July 1973, p.3 14

U.S. Const., Amendment 14, §5 16

29 USC §206 (d) [29 USCS §206 (d)] 11

42 USC §2000e-2 (h) [42 USCS §2000e-2 (h)] 11

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

BRIEF FOR THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM AS AMICUS CURIAE*

---

*This brief is filed with the consent of all parties pursuant to Rule 42 of the Court.

INTEREST OF AMICUS CURIAE

The New York State Teachers' Retirement System is a public retirement system organized under Article 11 of the Education Law of the State of New York. Its membership consists of public school teachers, certain members of the State University system and the New York State Education Department. It is the largest teacher retirement system in the United States, having more than 240,000 members. Under the plan the System administers, certain of its benefits are calculated on the basis of actuarial tables which are predicated on the experience amassed by this System during its 55 years of operation and are adjusted further on the basis of the sex of the intended beneficiary. The procedures employed by the System would be significantly affected by this case.[1]

---

[1]A requirement that public retirement systems change from separate gender-based actuarial tables to non gender-based actuarial tables would create serious financial consequences for the New York City and the New York State retirement systems. The Chief Actuary for the five New York City public retirement systems has estimated that were his systems required to substitute non gender-based tables for gender-based tables, the added annual costs for the taxpayers of the City of New York would be approximately $35 million. Similarly, the actuaries of the three New York State retirement systems have estimated their additional annual costs to be approximately $85 million. The use of such tables would result in the creation of an unfunded accrued liability in excess of $1.3 billion, which would be in additon to all other existing liabilities of the systems. Part of the indicated cost is attributable to Article 5, Section 7 of the New York State Constitution which reads as follows:

> "After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

In *Birnbaum vs. New York State Teachers Retirement System*, 1958, 5 N.Y. 2d 1, 176 N.Y.S. 2d 984, 152 N.E. 2d 241, the New York State courts were asked to determine if the constitutional guarantee applied as well to actuarial tables in effect at the time a member joined a public retirement system if such tables produced a better benefit than would a table subsequently adopted by the retirement system. The Court of Appeals decided that the constitutional guarantee applied as well to the use of actuarial tables. As a consequence, all benefits based on actuarial tables had to be computed on the basis of actuarial tables in effect at the time a member joined the plan rather than on the basis of updated

SUMMARY OF ARGUMENT

I. The Court's reasoning in the case of *General Electric v. Gilbert*, 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976) compels a finding of no unlawful employment practice in the case now before this Court. As in *Gilbert*, the employer's female employees receive benefits which are at least as great, in the aggregate, as the benefits received by the employer's male employees. In order to establish a *prima facie* discrimination case under Title VII, it is necessary to demonstrate the existence of a discriminatory effect. Under the standard laid down in *Gilbert* and *Geduldig v. Aiello*, 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974) it is proper to measure discriminatory effect in employee benefit plans which must rely upon statistical and actuarial methods, not in terms of each individual participant, but rather in terms of relevant risk classes which are differentiated from each other on the basis of the burden placed upon the plan by each class. Viewed in this context, it is apparent that the employer's female participants, with their greater average longevity, impose a greater burden upon the retirement plan than the male employees. This is especially true where, as here, monthly benefits are the same for females as for similarly qualified males. By requiring greater employee contributions from female employees, the Petitioners have endeavored to equalize the relative impact upon the plan occasioned by the statistically provable differeces in longevity between the two sexes. Thus, the Petitioners' plan is equitable both in terms of aggregate risk protection, and in terms of the burden borne by each risk class, and, therefore, meets the standard laid down by the *Gilbert* and *Gedulig* cases.

(continued from preceding page)

actuarial tables. As a result of the Birnbaum decision, affected retirement systems in New York State were required to recalculate benefits awarded prior to the judicial pronouncement. We understand that in compiling the estimated costs of converting to non-gender-based tables, the New York State and City actuaries have not estimated the cost of retroactive adjustments of benefits previously awarded, which, if required, would substantially increase the systems' unfunded accrued liabilities.

BEST COPY AVAILABLE

II. The legislative history of Title VII demonstrates that Congress did not intend to preclude gender-based differences of treatment in industrial benefit plans, where such differences are supported actuarially. More specifically, the legislative history of the sex discrimination provisions of Title VII, which was fully reviewed and interpreted by this Court in the *Gilbert* case, indicates congressional intent to preserve the right of retirement systems to implement separate gender-based tables in the computation and determination of pension contributions and benefits.

In the case at bar, the judgments of the courts below were inconsistent with the determination of this Court in *Gilbert* and the legislative interpretations made therein. The courts below also erred in denying the Petitioners an opportunity to present evidence by way of actuarial considerations which would justify the use of separate gender-based tables. The Petitioners at a minimum, were entitled to a trial on the issue of whether the retirement plan they administer was justified on the basis of recognized actuarial tables which show the difference in longevity between males and females. The refusal of the courts below to conduct such a trial contravened the decisions of this Court in that it deprived the Petitioners of their rights to establish any legal defense or justification for the use of seperate gender-based tables.

POINT I

WHEN VIEWED IN THE CONTEXT OF *GENERAL ELECTRIC V. GILBERT*, IT IS APPARENT THAT THE RESPONDENTS HAVE NOT SHOWN A GENDER-BASED DISCRIMINATORY EFFECT AT ALL

A. The Petitioners' plan provides as great an aggregate benefit to female employees as it does to male employees, therefore there is no gender-based descrimination at all in the present case.

At the outset, Petitioners assert that this Court's decision in the *Gilbert* case is directly in point and compels a reversal of the decision of the Court of Appeals in the instant case. In both the *Gilbert* case and the present case, employee benefit plans are involved which require, for their implementation, reliance upon actuarial techniques and statistical data. In the present case, as in *Gilbert*, an employer is being charged with an unlawful employment practice in administering an employee benefit plan, notwithstanding the fact that the employer's contributions to the plan in this case are at least as great for female employees as for similarly qualified male employees. This Court's statement in *Geduldig* that,

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." 417 U.S. 496, 94 S. Ct. 2492, 41 L. Ed. 2d 264

is precisely in point in the instant case. Just as in *Geduldig* and *Gilbert*, the employer's contributions to the benefit plan in this case provide a benefit which is at least as great in the aggregate for females, as for males. Also, as in *Geduldig* and *Gilbert*, it is indisputable that "the fiscal and actuarial benefits of the program ...accrue to members of both sexes", *Geduldig* at 417 U.S. 497 n.20, 94 S.Ct. 2492 n.20, 41L. Ed. 2d 264, n20. In fact, in the instant case, the *actuarial* benefit accruing to the class of female employees is greater than that for male employees, since not only do female retirees receive the same periodic benefits under Petitioners' plan as similarly qualified male retirees, but the

female employees, as a class, can be expected to live considerably longer than their male counterparts; thus the female retirees will receive greater aggregate benefits.

It is for this reason that the Petitioners in this case require an additional contribution from female employees, i.e. to help in funding the greater aggregate benefit accruing to the class of female employees. However, this hardly constitutes impermissible discrimination since it is undisputed that the employer's contributions to the benefit plan are in fact even greater for females than for similarly qualified male employees, and, even without the additional contributions made by the female employees to the plan, the aggregate protection derived by the class consisting of all the employer's female employees is at least equal to that enjoyed by the male employees. In other words, the plan administered by the Petitioners in no way works to "discriminate against any definable group or class in terms of aggregate risk protection derived by that group or class from the program," (either in terms of employer contributions to the plan, or in terms of the aggregate benefit derived by either group). *Geduldig* at 417 U.S. 496, 94 S. Ct. 2492, 41 L. Ed. 2d 264. Hence, the facts fail to support a finding of gender-based discrimination at all in this case, and a Title VII violation cannot lie. This is exactly the same conclusion reached by the majority of this Court in *Gilbert* where, after noting that there was no differentiation by General Electric in terms of the aggregate protection provided to its female employees as a class, it stated:

> "Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice . . . , *Geduldig* is precisely in point in its holding that [General Electric's disability plan] is not a gender-based discrimination at all." 429 U.S. 136, 97 S. Ct. 408, 50 L. Ed. 2d 354.

Finally, in this connection, it is significant to note, as Justice Kilkenney did in his dissenting opinion in this case in the Court of Appeals, what this Court said in *Gilbert* of the cost to General Electric of its benefit plan:

> "Absent proof of different values, the cost to 'insure' against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance', there would clearly be no gender-based discrimination . . . While respondents seem to acknowledge that the failure to provide any benefit plan at all would not constitute sex-based discrimination in violation of Title VII ..., they illogically also suggest that the present scheme does violate Title VII..." 429 U.S. 139, n. 17, 97 S. Ct. 409 n. 17, 50 L. Ed. 2d 356, n. 17.

Nothing could be more descriptive of the circumstances in the present case. Just as in *Gilbert*, if the employer, instead of providing a retirement plan for its employees, elected to increase wages by the amount it contributes to the cost of the plan, the female employees would actually be better compensated than similarly situated male employees. This results from the fact that the employer is actually contributing more on behalf of each female employee than it is for each male employee. To assert that the Petitioners are, nevertheless, unfairly discriminating against female employees grossly distort the meaning and intent of Titles VII and the Equal Pay Act, as *Gilbert* demonstrates. Clearly, there is no discriminatory effect in the present case which works against female employees.

B. In the case before the Court, discriminatory effect is most relevantly measured by comparing risk classes, the individual members of which are grouped according to the quantum of risk which they introduce to the plan; viewed in this manner, it is apparent that there is no discriminatory effect against the employer's female employees.

The Respondents object to being considered as members of a class, i.e. the class of all female employees, for the purpose of aiding in determining their retirement allowances. Respondents argue that this constitutes an impermissible stereotyping of members of their sex which violates the standards thus far laid down by this Court. While, at first glance, this argument may appear to have some merit, a closer look at some of the

circumstances prevailing in the instant case reveals this to be an extremely simplistic argument, and one which ignores fundamental differences between this case and past disputes arising under Title VII involving sex discrimination. Absolute individual equity is seldom attainable in any type of insurance or pension program. However, in order to come as close as possible to individual equity, individuals are grouped together in terms of the amount of risk they contribute to the plan, and their required contributions to the plan are determined accordingly.

In "Life Insurance," 6th Edition, by S.S. Heubner and Kenneth Black Jr., New York: Appleton — Century Crofts, page 441, it is stated:

> "In any insurance plan, each insured person contributes to a common fund . . . In order to maintain equity between different classes of policyholders, each insured should contribute according to the risk which he transfers to the common fund. If one person is allowed to pay less than his share, it will necessitate an overcharge against other persons in order to keep the common fund solvent...."

The relevant actuarial principles involved in the administration of retirement and pension plans are embodied in the above quotation.[2] In a pension plan, as in life insurance, longevity tables form a basis for evaluating prospective risks. Also, in a pension fund, a very real risk is being insured against, that is, the risk of having one live one's later years in financial insecurity. That females have a demonstratably longer life expectancy makes this risk greater for females than for males, hence the desire of plan administrators to distribute some of the additional burden attributable to this risk back to the group which introduces it.[3]

[2]For an in-depth analysis of this insurance principle, see Barbara J. Lautzenheiser, FSA. "Sex and the Single Table: Equal Monthly Retirement Income For the Sexes?", Employee Benefits Journal, Fall, 1976, published by the International Foundation of Employee Benefit Plans. This concept is also explained in a statement made by Richard Minck in behalf of the American Life Insurance Association and the Health Insurance Association of America on October 15, 1974 in connection with HEW proposed rules at page 22:

> "[I]n the insurance context, equity has meaning only for

Indeed, when viewed in its most fundamental form, the real basis for differentiation in actuarial tables is not sex at all, rather it is life expectancy. In most life insurance programs, as well as retirement plans, it is this crucial factor which is essential for sound benefit planning. And herein lies the major difference between this case and the vast majority of cases arising under Title VII before this Court in the past; that is, in past disputes it has almost always been possible for an employer to evaluate each employee's qualifications and pay demands individually, and Title VII fairly requires nothing less where such an evaluation is reasonably possible. However, an employer providing benefits which require the evaluation of various insurance-related principles, including longevity, finds that individual analysis is not only commercially impractical — it is impossible. Yet some type of evaluation of longevity in a retirement program is essential to maintain the continued solvency of the fund, and it is urged that the current, universally accepted actuarial method most fairly accomplishes this evaluation by differentiating

(continued from preceding page)

> groups. Within each such group, some individuals will receive more than others and some will receive less than others, but all will have the risk they insured against equitably covered . . . Group equity, not individual equity, is necessary for the insurance principal to function."

[3]It should be noted that basically there are two correllative ways the plan administrator can compensate for the additional burden attributable to the female participants' longer life expectancy. One is to provide equal monthly benefits to similarly qualified male and female employees, and require greater contributions from the female participants in order to help fund the greater aggregate benefit derived by the class of female participants. This is, in essence, the method adopted by the Petitioners. The other approach, adopted by many plans, is to reduce the periodic benefit received by female participants to compensate for their greater longevity, thereby equalizing the aggregate benefits derived by both sexes. Under this approach, employee and employer contributions may be identical for similarly qualified employees, regardless of sex. Both methods, however, are merely analogs of each other and accomplish the same objective, that is, they both fairly relate the aggregate benefit derived by an identifiable risk group, to the burden or risk contributed by that group.

between substantially disparate groups in terms of life expectancy, thereby preventing cross-subsidization of dissimilar classes (subsidization of the female employees by the males would be inescapable if the Petitioner were forced to use unisex tables since the cost of the plan for females would remain greater than that for males; only the tables would change, the life expectancy differential and actual cost allocations would remain the same). Clearly then, in a retirement program such as the Petitioners', group equity most closely approaches individual equity, and prevents one identifiable risk group from being compelled to subsidize another.

In fact, in view of the above, were unisex tables mandated, the Petitioners would have a plan, which, though perhaps facially neutral, would discriminate against male employees by requiring them to subsidize a greater risk group. Viewed in this context, and we submit that in an annuity program it is the *only* workable context, no one group is being discriminated against since each risk group is indeed pulling its own weight.

This, it is submitted, was recognized by this Court in both the *Geduldig* and *Gilbert* cases when it stated:

> "There is no evidence in the record that the selection of risks insured by the program worked to discriminate against any definable group or class in terms of the *aggregate risk protection derived by that group or class* from the program." 417 U.S. 496, 94 S. Ct. 2492, 41 L. Ed. 2d 264 (emphasis added)

It is for this reason that the New York State Teachers' Retirement System, as *amicus curiae*, respectfully urges this Court to find that its decision in *Gilbert* is controlling in the case at bar, and necessitates a dismissal of the charges since there is no discriminatory effect against the employer's female employees.

POINT II

THE LEGAL STANDARDS APPLIED BY THE COURTS BELOW VIOLATED THE PROVISONS OF TITLE VII, AS REFLECTED IN THE LEGISLATIVE INTENT AND DECISIONS OF THIS COURT

Title VII, §703 (a) (1) includes provision that it shall be an unlawful employment practice for an employer

> ". . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin", 42 USC § 2000e-2[42 USCS §2000e-2].

This Court noted in *Gilbert*, 429 U.S. 125, 143, 50L. ED. 2d 345, 358, 359, 97 S. Ct. 401 (1977), that despite the brevity of the sex discrimination prohibition of Title VII, that Congress paid special attention to the provisions of the Equal Pay Act, 29 USC §206(d) [29 USCS §206(d)] when it amended §703 (h) of Title VII by adding the Bennett Amendment, which provides as follows:

> "It shall not be an unlawful practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29." 42 USC §2000e-2(h) [42 USCS §2000e-2(h)]."

As this Court noted in *Gilbert*, at 429 U.S. 125, 144, 50 L. ED. 2d 343, 359, 97 S. Ct. 401, Senator Humphrey, the floor manager of the bill, stated "that the purpose of the amendment was to make it 'unmistakably clear' that differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law."

It is respecfully submitted that in this case, the Court of Appeals, in denying Appellant's request for a rehearing, overlooked the import of and failed to follow this Court's decision in the *Gilbert* case. The Court of Appeals practically ignored the legislative history which was emphasized by this Court in the *Gilbert* case. Specifically, the Court of Appeals

attempted to summarily dismiss as irrelevant, an interpretative bulletin promulgated by the Wage and Hour Administrator under the Equal Pay Act, which bulletin was quoted by both this Court in *Gilbert* and by Circuit Judge Kilkenney in his dissent, in the instant case, in the Court of Appeals. That bulletin provides as follows:

> "If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees." [29 CFR §800.116(d) (1975)].

The quoted bulletin, relating to employee benefits demostrates that no statutory violation results from the *bona fide* use of separate actuarial tables in the computation of pension, insurance and other employee benefits. As Judge Kilkenney stated in his dissent in this case in the Court of Appeals:

> "In the context of pension plans, this rule makes sense only if it is read to impliedly authorize the funding of employee pension plans upon the basis of separate mortality tables. This regulatory justification for a plan with equal contributions and unequal benefits cannot be ignored in the variation before us."

It is significant to note that the variations countenanced by the bulletin promulgated by the Wage and Hour Administrator are of such a nature as to nevertheless insure equitable treatment to both of the sexes. In the case at bar, Respondents contend that they, as women, have been the victims of invidious discrimination. That contention overlooks the fact that the effect of separate tables is often to provide women with justified advantages in certain areas; particularly in life insurance, where females have more favorable rates than males. Furthermore, the abolition of seperate tables in favor of unisex tables constitutes an unrealistic mandate to ignore a real difference between the

sexes and can only result in invidious discrimination against each of the sexes. The arguments made in support of this conclusion are cogently set forth in a paper entitled "Sex and the Single Table: Equal Monthly Retirement Income For The Sexes?".[4]

The differences in contributions and benefits, which result when pension plans implement separate actuarial tables, are neither male nor female oriented. Although these differences do in particular instances require or result in a disparity in their impact on the respective sexes, they are by no means a "pretext designed to effect an invidious discrimination against the member of one sex or the other." *Geduldig* and *Gilbert, supra.*

The distinctions in contributions and benefits are the product of a real life expectancy difference between the sexes; a difference, which is so uniformly acknowledged, that it is a proper subject of judicial notice; a difference which was reflected in uncontroverted affidavits in the District Court in the instant case (see J. Kilkenney's Dissent in the Circuit Court of Appeals); a difference which has been recognized to be biological in origin; a difference which was confirmed in a study showing that the life span of monks and nuns, living similar lives, was about the same as the population as a whole [TIAA Participant, July,1973 p. 3, citing Madigan, "Are Sex Mortality Differentials Biologically Caused?" Milbank Memorial Fund Quarterly, Vol. 35, pp. 203-223 (1957)]; a difference confirmed by lower female mortality rates at all ages "Mortality Under Standard Ordinary Insurance Issues between 1972 and 1973 Anniversaries," Transactions, Societies of Actuaries, 1974 Reports Number, pp. 18-22); and a difference that is so pervasive that it has been stated:

> "All mortality statistics, whether U.S. population surveys, Social Security statistics, annuitant death rates, life insurance experience, or world-wide health studies, show clearly that at all ages women's average life expectancy is substantially longer than men's."

---

[4]Lautzenheiser, FSA, *supra* note 2.

> "The consensus [is] that the mortality differential between men and women cannot be satisfactorily explained by environmental, occupational, or economic differences, and that women do have an innate biological or genetic advantage over men." (Teachers Insurance and Annuity Association — College Retirement Equities Fund, *The Participant*, July 1973, p. 3)."

Although some of the foregoing facts obviously are not part of the record, they are indeed significant since they would have been the proper subject of expert testimony at a hearing. However, no opportunity to present such facts was ever provided because the District Court granted summary judgment. The right of the Petitioners to present such facts and the need for the Courts to consider them was specifically recognized by J. Kilkenney when he stated in his dissent below:

> "I am convinced that the legal principles ennunciated in *General Electric Co. v. Gilbert*, (429) U.S. (125), (Dec. 7, 1976), are here controlling and that the district court erred in granting summary judgment against the appellants. *At a minimum, the court should have conducted a trial on the issue of whether the appellants' retirement plan was justified on the basis of recognized actuarial tables showing the difference in longevity between males and females.*" (emphasis added)

In the case at bar, the majority, in denying the motion for rehearing, concluded that the plan in question was "facially discriminatory". The majority found it unnecessary to provide the retirement system with an opportunity to present proof in justification of its plan. Amicus, as indicated, contends that the plan in question is non-discriminatory. However, even assuming arguendo, that the plan of the retirement system, including the use of separate tables appeared to be discrimatory, it is respectfully submitted that the retirement system was legally entitled to an opportunity to demonstrate that its plan was actuarilly justified; and that in any case the determination of the majority in the Court of Appeals granting summary judgment violated the principles set forth by this Court in *Gilbert*, 429 U.S. 125, 137, 50 L. Ed. 2d 343, 355, 97 S. Ct. 401, footnote 14[4b] as follows:

> "In *Griggs, supra*, the burden placed on the employer 'of showing that any given requirement must have a manifest relationship to the employment in question,' 401 US, at 432, 28 L. Ed. 2d 158, 91 S. Ct. 849, did not arise until discriminatory effect has been shown, *Albermarle* 422 US at 425, 45 L. Ed. 2d 280, 95 S. Ct. 2362."

This Court also recognized and reiterated the right of an employer to establish a defense to a *prima facie* case of sex discrimination in the recent case of *Dothard v. Rawlinson*, 45 United States Law Week 4888, 4890, (decided June 27, 1977), where it was stated:

> "Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question.' *Griggs v. Duke Power Co.*, 401 U.S. at 432."

The legislative history of Title VII also reflects allowance for a rational basis justification for employment distinctions between the sexes. Senator Clark in presenting Title VII indicated in his explanation of the House Bill, "Furthermore, under Title VII, jobs can no longer be classified as to sex, except where there is a *rational basis for discrimination*, on the ground of *bonafide* occupational qualification." (emphasis added) It was likewise noted that under the House Bill "wherever sex is a *bona fide* job qualification or disqualification for a particular job, Title VII does not require that equal job opportunity be given to both sexes." (110 CR 7217)

It is also respectfully submitted that it was error to grant summary judgement in the absence of evidence to support a finding of purposeful discrimination; that a standard which did not require purposeful discrimination and did not permit a state or local government to prove a defense of justification to an alleged violation of Title VII would be unconstitutional. As originally enacted Title VII of the Civil Rights Act of 1964 applied only to private employers. The Act was expanded to include state and local governmental employers by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, eff. March 24, 1972. This was done pursuant to U.S. Const., Amendment 14,

§5 which granted the Congress the power to enforce the provisions of the Fourteenth Amendment by appropriate legislation.

The limits of Title VII, to the extent that Title VII is made applicable to state and local governments, cannot constitutionally exceed the limits of the Fourteenth Amendment; i.e. Congress, acting under a constitutional grant of power, could not enact legislation which was broader than or beyond the scope of the underlying constitutional grant of power.

Even in the more closely scrutinized area of racial discrimination, this Court has recognized that proof of discriminatory purpose is necessary to make out a discrimination cause of action under the Fourteenth Amendment of the Constitution. In the case of *Washington v. Davis*, 426 U.S. 229, 244, 245, 48 L. Ed. 2d 597, 610, 611, 96 S. Ct. 2040 (1976), this Court stated:

> "The cases impressively demonstrate that there is another side to the issue; but with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement."

And in *Geduldig supra*, this Court stated at 417 U.S. 484, 497, 41 L. Ed., 256, 265, 94 S. Ct. 2485, 2492 (1974) at Footnote 20, as follows:

> "Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this *on any reasonable basis*, just as with respect to any other physical condition." (emphasis added).

In contrast to the foregoing, the District Court in the case at bar stated at 387 F. Supp. 980, 984 (1975):

> "In short, under the Equal Employment Opportunity Act of 1972, all stereotypic treatment of persons based on race, religion, or sex whether *rational* or irrational is dead." (emphasis added)

It is respectfully submitted that the legal standard applied by

the District Court, as well as the Court of Appeals, was violative of the legislative history and legal decisions made by this Court in the field of discrimination; and it is further and alternatively submitted that to the extent that the standards of Title VII purport to exceed in their stringency the limits of the Fourteenth Amendment, they are unconstitutional. Accordingly it is respectfully submitted that the use of separate tables by public pension funds is non-discriminatory and consistent with the will of Congress under Title VII; or at the very least, consistent with the constitutional limits of congressional authority; and that in any case, it was error for the Courts below to deprive the retirement system of an opportunity by way of a hearing to establish a legally justifying defense.

CONCLUSION

The New York State Teachers' Retirement System, as Amicus Curiae, respectfully requests that the judgment of the United States District Court and the judgment of the United States Court of Appeals be reversed.

Respectfully submitted,

HARRY L. DU BRIN, JR.
New York State Teachers'
Retirement System
143 Washington Avenue
Albany, New York 12210
Assistant Executive Director
and Legal Advisor

KARL E. NISOFF, Counsel
WILLIAM B. JENSEN, Assistant Counsel
DAVID A. WEISS, Assistant Counsel